FILE COPY

FILED
SEP 2 1936
CHARLES ELMORE CROP
CLER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE OF THE ESTATE OF W. H. PENTONY, BANKRUPT, AND CHARLES P. WILHELM, TRUSTEE OF THE ESTATE OF W. H. PENTONY, BANKRUPT,

Petitioners,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. E. PARRACK,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement of matter involved	2
Questions presented	4
Reasons relied on for allowance of the writ	6
Prayer for writ	7
Brief in support of petition	8
Opinions below	8
Jurisdiction	8
Statement of facts	9
Statute authorizing depository bond	11
Specification of errors	11
Argument	12

Table of Cases Cited.

Andrew v. Bank, 219 N. W. 34	16
Board of Commissioners v. Bank, 252 Pac. 475	16
Continental Casualty Co. v. United States, 68 F. (2d) 577	6, 9
Lloyds v. Harper, 16 Eng. Ch. Div. 290	14
Minturn v. United States, 106 U. S. 437	9
Mitchell v. Bank, 65 S. W. (2d) 99	16
Oakland County v. Casualty Co., 255 N. W. 229	16
Pickens v. Love, 171 S. E. 799	16
Smith v. United States, 8 L. Ed. 130	9
United States ex rel. Townshend v. Robson, 28 Am. B. R. 45	13

Statutes Cited.

U. S. C. A., Title 11, Sec. 75, subsections 3 and 4	16
U. S. C. A., Title 11, Sec. 101	9, 11, 14, 15, 16
West Virginia Code, Chapter 44, Art. 2, Section 26	13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 335

UNITED STATES OF AMERICA, WHICH SUES FOR THE USE AND BENEFIT OF CHARLES P. WILHELM, TRUSTEE OF THE ESTATE OF W. H. PENTONY, BANKRUPT, AND CHARLES P. WILHELM, TRUSTEE OF THE ESTATE OF W. H. PENTONY, BANKRUPT,

Petitioners,

vs.

NELLIE FLYNN CHAIN, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES W. FLYNN, DECEASED.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the United States of America, which sues for the use and benefit of Charles P. Wilhelm, trustee of the estate of W. H. Pentony, Bankrupt, and of Charles P. Wilhelm, trustee of the estate of W. H. Pentony, Bankrupt, in Bankruptcy, respectfully shows to this Honorable Court:

Statement of Matter Involved.

The United States Circuit Court of Appeals for the Fourth Circuit rendered an opinion and made an order, judgment and decree on June 8, 1936, reversing a judgment rendered by the District Court of the United States for the Northern District of West Virginia, on September 21, 1935, in an action at law then pending in said District Court, being an action of debt on bond, which judgment was in favor of the petitioners, and jointly and severally against George A. Herring, the Kingwood National Bank, a Corporation, and the respondent, Nellie Flynn Chain, executrix of the will of James W. Flynn, deceased, for the sum of $3,680.25. The respondent alone prosecuted an appeal from said judgment to said Circuit Court of Appeals; from the judgment and order of said Circuit Court of Appeals the Senior Circuit Judge dissented.

The action in which said judgment was rendered was based on a bond payable to the United States of America, in the penalty of five thousand (5,000) dollars, dated July 26, 1924, signed by The Kingwood National Bank, a national banking association then engaged in business at Kingwood, in said Northern District of West Virginia, as principal, and by James W. Flynn and Geo. A. Herring, as sureties. James W. Flynn was then president of said banking institution. The bond recited, and which was a proper recital of the facts, that on July 22, 1924, W. E. Baker, Judge of said District Court, had designated said The Kingwood National Bank as a depository of funds arising from the matter of estates of bankrupts, and fixed the penalty of the required bond at five thousand (5,000) dollars.

Condition of Bond.

The condition of the bond was as follows:

> "Whereas, the said The Kingwood National Bank was on the 22nd day of July, 1924, designated by the Honorable W. E. Baker, Judge of the District Court of the United States for the Northern District of West Virginia, as depository for the funds arising in the matter of the estates of bankrupts, under the acts of Congress relating to Bankruptcy.
>
> "Now, Therefore, if the said The Kingwood National Bank shall well and faithfully discharge and perform all the duties pertaining to it as depository of the funds arising in the estates of bankrupts, then this obligation shall be void, otherwise to remain in full force and virtue."

Statute Authorizing Designation.

Said bank was designated as a depository as aforesaid under Section 101 of Title 11 of the United States Code of Laws, which reads as follows:

> Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

The bond in question was filed and approved July 30, 1924, and said bank, without giving further or other bond at any time, continued to act as a depository for such funds of bankrupt estates until June 22, 1931, when it became insolvent, closed its doors and a receiver for it was ap-

pointed by the Comptroller of the Currency of the United States (R. 6-12).

Petitioner Charles P. Wilhelm was, on July 9, 1930, appointed and qualified as trustee of the estate in bankruptcy of W. H. Pentony, a bankrupt, whose estate was then in course of administration by said District Court, and said petitioner, by direction of said court through its Referee in Bankruptcy, deposited funds of said bankrupt estate in said depository from time to time, and when said debtor closed its doors had on deposit of such funds $3,190.72 (R. 6).

Said bank, through its receiver, refused payment of this amount, and by direction of the referee the action above mentioned was instituted in said District Court.

James W. Flynn died, testate, in March, 1926. His will was probated, and respondent qualified as executrix thereof May 8, 1926, and is still acting in that capacity.

Respondent demurred to the declaration, and said demurrer appears on pages seven to nine inclusive of the record. But without awaiting action of the court on said demurrer, respondent, petitioner and all other parties in interest made a written, signed stipulation agreeing that if pertinent certain matters to the pertinency of which he objected were true, but not waiving objection to the pertinency of said matters. Said stipulation appears on pages eleven to fourteen of the record.

Questions Presented.

The controlling question is whether the death of the surety James W. Flynn, without notice thereof to the District Court or any of its officers, and without action of any kind being taken by his executrix, relieved his estate from further liability because of his suretyship on the aforesaid bond.

Incidental to the determination of the question are:

(a) What is the result of the designation of a bank as a depository of funds of bankrupt estates, and the execution and approval of the required bond? Does that immediately give the bank the status of a depository, or does it become a depository only when funds are deposited therein?

(b) What is the consideration for the execution of the bond? Is it the depositing of money in the bank, or is it the status which the bank acquires whereby it is placed and kept qualified at all times to receive such funds when tendered?

(c) Is the giving of the bond a mere revocable offer by the bank to be a depository, and does it acquire the status of a depository each time a deposit is made and lose such status if and when all deposits are withdrawn, and again become a depository when another deposit is made?

(d) Is it violative of public policy that the securities offered by the bond to creditors of bankrupts should be lost by the death of the sureties without further action or notice?

(e) Is it the duty of a District Court to keep himself constantly informed whether such sureties are still in life? And if it is his duty to do so, does a failure to perform that duty affect the liability of the estate of a decedent surety and destroy the security given by the bond for bankrupt funds?

(f) Was the bond in question a binding co ract from the date of its execution, or merely an offer not ripening into a contract until deposits were made?

(g) Was the consideration for the bond the establishment of the bank in a certain status, namely, a depository,

or was said consideration fragmentary, being supplied from time to time by deposits in the bank?

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals of the Fourth Circuit has in this case decided a Federal question of substance not heretofore decided by this Court. This Court has not decided in any case whether the death of a surety on the bond executed by a bank for the purpose of qualifying as a depository of funds arising in the matter of the estate of bankrupts after said bank has been designated as such depository by the District Court of the United States relieves the estate of such surety from liability for funds deposited in such depository after a surety's death.

2. The judgment and order in this case as made and rendered by said United States Circuit Court of Appeals is in substantial conflict with the opinion and decision of the United States Circuit Court of Appeals for the Seventh Circuit as to the release of sureties on such bond as was the subject of suit in this case, in

Continental Casualty Company v. *United States*, 68 F. (2d), 577.

3. Said United States Circuit Court of Appeals for the Fourth Circuit has in this case decided a question of general importance, namely, the effect of the death of a surety on such bond as is above mentioned upon the surety's liability for future deposits in the depository. That question has not been, but should be settled by this Court.

4. The above mentioned question is a question of general law affecting the security of funds of bankrupt estates throughout the entire United States, and was decided by said Circuit Court of Appeals in a way untenable and in conflict with the weight of authorities.

WHEREFORE your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket Number 4007, at law, styled Nellie Flynn Chain, executrix of the last will and testament of James W. Flynn, deceased, appellant, *vs.* Charles P. Wilhelm, trustee of the estate of W. H. Pentony, bankrupt, appellee; that said judgment and order of said United States Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just, and your petitioners will ever pray.

UNITED STATES OF AMERICA AND
CHARLES P. WILHELM,
Trustee of the Estate of
W. H. Pentony, Bankrupt,
Petitioners.

By F. E. PARRACK,
Their Attorney.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court of the United States for the Northern District of West Virginia in entering the judgment appealed from by respondent, did not render an opinion. The judgment order appears in the printed transcript of the record certified from the Circuit Court of Appeals on pages ten and eleven.

The opinion of the Circuit Court of Appeals upon a review of said case on appeal appears in full from the printed copy of said opinion certified to this Court by said Circuit Court of Appeals. This Court is respectfully referred to said records.

Jurisdiction.

(1) The Circuit Court of Appeals has decided a Federal question of great importance which has not, so far as we have been able to ascertain, been decided by this Honorable Court, namely, that the death of a surety on the bond of a depository of funds of bankrupt estates terminates liability of his estate for future deposits in such depository without any notice or other action by the personal representative to be relieved from such liability.

(2) The United States Circuit Court of Appeals for the Fourth Circuit has decided that a surety on such depository bond may be released by the mere fact of his death, and that it is the duty of the Judge of the District Court of the United States to keep himself constantly informed as to the continued life of such surety, and in this respect the decision is in substantial conflict with the decision of the

United States Circuit Court of Appeals of the Seventh Circuit in

Continental Casualty Company v. *United States*, 68 F. (2d) 577, Points 12, 13 and 14 of Syllabus.

(3) The said Circuit Court of Appeals has decided that a national bank executing the required bond after being properly designated as a depository of funds arising in the matter of bankrupt estates does not become a depository upon the approval of such bond, but only becomes a depository when funds of bankrupt estates are on deposit with it. This is an important federal question, involving the proper construction of Title 11, Section 101, U. S. C. A., which has not been, but should be determined by this Court.

(4) The conclusion of said Circuit Court of Appeals in the majority opinion that the failure of the District Judge to discharge what it conceives to be his duty in keeping himself informed as to the continued life of a surety can prejudice the right of the United States as the obligee of the bond in question does not give proper effect to the applicable decision of this Court in

Minturn v. *United States*, 106 U. S. 437, Pt. 3 Syl., and *Smith* v. *United States*, 8 L. Ed. 130.

Statement.

In the District Court of the United States for the Northern District of West Virginia, this case was submitted to the court in lieu of a jury upon the pleadings and stipulations of facts. That stipulation appears at length in the bill of exceptions in the printed record, pages eleven and fourteen, inclusive. From that statement it appears that after The Kingwood National Bank, of Kingwood, West Virginia, had been designated as a depository of funds of

bankrupt estates, it as principal executed a bond as required by its designation with George A. Herring and James W. Flynn as its sureties, which bond appears at length in said printed record, pages three and four; that at the date of said bond, July 26, 1924, James W. Flynn was the president and George A. Herring the vice president of said bank; that said bank, without giving further bond, continued to act as such depository until the twenty-second day of June, 1931; that James W. Flynn died, testate, in March, 1926, and respondent qualified and is still acting as executrix of his will; that petitioner, Charles P. Wilhelm, qualified on July 24, 1930, as trustee for W. H. Pentony, a bankrupt, whose estate was being administered by the District Court of the United States for the Northern District of West Virginia; that thereafter, from time to time, by direction of the Referee in Bankruptcy, said trustee deposited funds in said depository, and on June 22, 1931, said bank closed its doors, being insolvent, and a receiver therefor was appointed by the Comptroller of the Currency of the United States, said petitioner Charles P. Wilhelm, trustee, then having funds of said bankrupt estate in the sum of $3,190.72 on deposit in said bank.

Said receiver refused to pay, and at the instance of the Referee said suit was instituted on said bond; certain facts were stipulated to be true if material, but the materiality thereof was not waived, but was submitted along with other matters to said District Court, one being that said respondent did not know at any time prior to the closing of said bank that her testator was surety on the depository bond.

That after the death of Flynn, Herring became the president of the bank, and continued as such until it closed; that the trustee resided in Kingwood, but had no knowledge of Flynn's death until June, 1931; that had he made a personal investigation as to the depository bond given by said

bank he would have learned of Flynn's death, that he had no knowledge of the sureties on said bond, but was informed by the Referee that said bank was a duly qualified depository, and said Referee approved the deposit of the funds therein.

The District Court, upon the stipulation aforesaid of the facts, entered judgment in favor of the petitioner, Wilhelm, trustee, for $3,680.25, with interest and costs against respondent, said The Kingwood National Bank and George A. Herring. Respondent alone prosecuted the appeal to the Circuit Court of Appeals, which court rendered the judgment, the opinion complained of, the senior circuit judge dissenting.

The Statute.

Said The Kingwood National Bank was designated as a depository for such bankrupt funds under the provisions of Section 101, Title Eleven, U. S. C. A., which reads as follows:

> "Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

Specification of Errors.

The United States Circuit Court of Appeals for the Fourth Circuit erred:

(1) In holding that the depository bond in this case is analogous to a guaranty of a series of sales or credits,

rather than to an official bond, and in holding that the bank is not an actual depository until funds are deposited therein.

(2) In holding that the execution of the bond in question was a mere offer upon the part of the principal and surety to contract with such officers of bankrupt courts as might thereafter deposit funds in said bank.

(3) In holding that the trustee was charged with notice of the contents of the bond given by said bank as such depository, and was not justified in relying upon the information given him by the Referee that said bank was an authorized depository.

(4) In holding that it was the duty of the District Court to be continually informed as to whether sureties on depository bonds are living or dead.

(5) In holding that the death of Flynn relieved his estate from liability on said bond, and in reversing the judgment of the District Court in this case.

Argument.

I.

This case presents an important question not previously decided by this Court. It is a question of great importance. If the holding of the Circuit Court of Appeals in this case is sustained, then creditors of individuals, firms or corporations adjudged bankrupts may have the strong arm of the Government take from them the right to proceed in the usual manner for the collection of their demands against their debtor, only to find that the Government has failed to conserve and administer the assets of such debtor for their benefit. We believe that sound public policy demands that sureties and their estates upon such bonds should be held to most strict accountability, and not lightly released from liability thereon. The precise question here presented

has never been decided, so far as we can ascertain, by any Circuit Court of Appeals except in this case. The question of the discharge of a surety from such bond by his death was presented in

> *United States ex rel. Townshend, Trustee, et al.*, v. *Robson et al.*, 28 American Bankruptcy Reports, 45,

by Judge Northcott, sitting as District Judge in the Southern District of West Virginia; but in that case there was a very potent factor justifying the conclusion that the surety was released, which factor does not exist in this case. In that case, after the death of the surety his estate had been completely administered under the laws of the State of West Virginia, and the administration thereof duly closed. The Statute of West Virginia relating to the effect of the completion of the administration act reads as follows:

> "Every person having a claim against a deceased person, whether due or not, who shall not, when notice to creditors has been published as described in this Article, have presented his claim on or before the time fixed in such notice, or before that time have instituted action or suit thereon, shall, notwithstanding the same be not barred by some other statute of limitations that is applicable thereto, be barred from recovering such claim of or from the personal representative, or from thereafter setting off the same against the personal representative in any action or suit whatever."
>
> Part of Chapter 44, Article 2, Section 26, West Virginia Code.

II.

The majority opinion contains this statement relative to James W. Flynn:

> "When he died, the bond had been in existence for two years, and so far as we know, no trustee in bank-

ruptcy had ever made his deposit in the bank under the protection of the sureties' promise."

It is a violent assumption that said bank had been a qualified depository for funds of bankrupt estates for about seven years and that no funds of such estates had ever been deposited therein. Such assumption is not warranted by anything in the record. The stipulation of facts did not concern itself with deposits made by other trustees, and had the matter been submitted to a jury no trial court would have permitted evidence to be given to the jury as to such deposits.

III.

The majority opinion of the said Circuit Court of Appeals makes an untenable distinction between what it terms a depository for funds of bankrupt estates and an actual depository. Section 101, Title 11 of the Bankruptcy Act certainly was not designed to create a mythical or unsubstantial status of a bank designated as a depository under the terms thereof and executing the required bond.

Lloyds v. *Harper*, 16 Eng. Chancery Division, 290, holds that where a guaranty is given for a consideration once for all it can not be terminated by the death of the guarantor, even upon notice.

For what was the bond given? In this case the bond was given not to secure funds deposited by any particular trustee or receiver, nor can it be analogous to a bond given for private purposes. The consideration for this bond was that the bank should have the status of a depository, not that it should receive any particular deposits of money, but that it should have the right to receive such deposits. The consideration for it was given once for all.

IV.

It was not the duty of the District Judge to devote himself to constant surveillance over various depositors' bonds and the sureties thereon. It was the duty of any surety trying to be released or desiring to be released to take active steps to that end. In

Continental Casualty Company v. *United States, supra,*

the surety notified the District Judge that it had canceled its suretyship on said bond. The Circuit Court of Appeals for the Seventh Circuit held that it was entitled to terminate its liability on the bond, with which conclusion we do not concur. But it further held that such surety must notify the District Court and receivers and trustees as well before it could terminate its liability.

This Court indicated, in *Smith* v. *United States, supra,* that there was no absolute right in the surety on a bond taken in compliance with law to withdraw from his suretyship, but expressed the opinion that no court would refuse to grant release if it were requested.

In this particular case the District Court had ample authority to require the depository to furnish a new bond or cease to be a depository.

U. S. C. A., Title 11, Section 101.

There can be no doubt that had the respondent applied for release from liability on the bond such action would have been taken. That she did not know of the suretyship can not affect the situation. In not informing herself as to the situation, she is no worse off than if without her knowledge her testator had been surety upon an administrator's bond, in which case his liability could not be questioned.